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No. 07-384

IN THE

Supreme Court of the United States

DANIEL MEASUREMENT SERVICES, INC.,
Petitioner,

v.

EAGLE RESEARCH CORP.,
Respondent.

On Petition For A Writ Of Certiorari To The Circuit Court Of Putnam County, West Virginia

REPLY BRIEF FOR PETITIONER

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RULE 29.6 STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER

When one cuts through the factual mischaracterizations and legal irrelevancies of respondent's brief in opposition, two simple and undeniable points emerge. First, a West Virginia jury returned a $10.5 million verdict against Daniel Measurement Services, Inc. ("DMS") in the absence of *any* record evidence regarding respondent's "reasonably ascertainable losses." Pet. App. 44a. Second, that verdict was never subjected to any meaningful judicial review by either the trial court or the West Virginia Supreme Court of Appeals. The jury's arbitrary imposition of a factually insupportable damages award and the West Virginia courts' failure to undertake meaningful review of that award deprived DMS of the due process rights guaranteed to it by the Fourteenth Amendment. There is an urgent need for this Court to grant review of this case to reiterate and reinforce the fundamental due process rights to which litigants in West Virginia—and state courts throughout the Nation—are entitled.

None of respondent's contrary arguments can obscure this blatant due process violation or undermine the compelling need for this Court's review. Respondent's attempt to muster evidentiary support for the breach-of-confidentiality award is unavailing because respondent itself concedes that the only evidence upon which the jury could have conceivably based its verdict was the testimony concerning the profits of DMS's corporate affiliate, Emerson. Opp. 5. But the trial judge expressly refused to give an instruction equating respondent's losses with DMS's corporate profits (Pet. App. 42a, 43a-45a)—which eliminates the only possible evidentiary support for the verdict. Respondent is also wrong to suggest that the West

Virginia courts undertook constitutionally adequate judicial review of the verdict. Due process requires more than the cursory level of review that took place here. Indeed, while the trial court acknowledged the lack of evidentiary support for the breach-of-confidentiality damages, it refused to correct this error, and the West Virginia Supreme Court of Appeals denied review altogether. DMS thus had no meaningful opportunity to obtain relief from the jury's arbitrary verdict. Finally, respondent's attempt to evade the due process principles set forth in cases such as *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), is similarly ineffectual because this Court's precedent makes clear that *all* damages awards—regardless of the label attached to them—must comport with fundamental due process requirements. *See Giaccio v. Pennsylvania*, 382 U.S. 399, 402 (1966). The West Virginia courts' failure to afford those minimal constitutional protections in this case warrants review by this Court.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DUE PROCESS JURISPRUDENCE.

The Due Process Clause guards against the arbitrary exercise of state power and requires a minimum level of rationality in a State's judicial procedures. *See, e.g., TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 467 (1993) (Kennedy, J., concurring in part and concurring in the judgment); *see also* Br. of National Association of Manufacturers at 9 ("This Court has made clear that due process requires state actors deciding whether to deprive a litigant of his or her property to meet minimum procedural safeguards demanded by rudimentary due process . . . .") (citing *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970)). DMS was denied these fundamental

constitutional protection when the West Virginia courts failed to undertake meaningful judicial review of a multimillion-dollar jury award that lacks all evidentiary support.

Respondent contends that the $10.5 million damages award for breach of the confidentiality agreement is based on "sufficient evidence of record" (Opp. 2), but then fails to identify any such evidence. The only evidence to which respondent points—testimony regarding the profits of DMS's corporate affiliate, Emerson (*id.* at 5)—is demonstrably insufficient to support the jury's verdict because the jury was instructed that any damages awarded for breach of the parties' confidentiality agreement must be based on "reasonably ascertainable losses" to respondent, rather than upon profits earned by DMS and its corporate affiliates. Pet. App. 44a. Thus, while a defendant's profits may be an appropriate measure of damages in some cases, this is not such a case because the jury was not instructed that it could use Emerson's profits as the basis for calculating respondent's losses. Respondent's lengthy discussion of *U.S. Naval Institute v. Charter Communications, Inc.*, 936 F.2d 692 (2d Cir. 1991), *University Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518 (5th Cir. 1974), and *Murphy v. Lischitz*, 49 N.Y.S.2d 439 (Sup. Ct. 1944), is therefore utterly irrelevant because, whether or not a defendant's profits can serve as the basis for determining a plaintiff's losses in *some* cases, it cannot do so in *this* case.[1]

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[1] Respondent is wrong to suggest that DMS somehow failed to preserve its right to seek this Court's review of the unsubstantiated breach-of-confidentiality verdict by failing to object to respondent's evidence regarding Emerson's lost profits or to respondent's closing argument. Opp. 16, 19. It is not the tes-

The imposition of a verdict that lacks all evidentiary support is squarely at odds with the due process protections repeatedly articulated by this Court. *See, e.g., TXO*, 509 U.S. at 453-54 (plurality op.). Respondent is therefore incorrect when it asserts that DMS "has not cited any cases holding that it has a federal constitutional right to have this Court determine whether the state court verdict against it is supported by the evidence." Opp. 8. A state court verdict that lacks *all* evidentiary support is an arbitrary deprivation of property, which this Court has long recognized constitutes a violation of due process. *See, e.g., Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292, 302 (1937) (due process protects "the individual against arbitrary action" by the State); *TXO*, 509 U.S. at 467 (Kennedy, J., concurring in part and concurring in the judgment). DMS is not contending, as respondent suggests, that every state court litigant has "a federal constitutional right to have this Court determine whether the decisions below were correctly made" (Opp. 9)—it is arguing that the Constitution protects against state court verdicts that are completely devoid of evidentiary support and that are never subject to meaningful judicial review. These circumstances transcend mere error and rise to the level of an arbitrary deprivation of prop-

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[Footnote continued from previous page]

timony presented by respondent or its closing argument that constitutes the constitutional violation in this case. DMS was deprived of its due process rights by the jury's factually insupportable multimillion-dollar breach-of-confidentiality verdict and by the absence of any meaningful judicial review of that verdict. DMS raised that argument below in briefing before the West Virginia Supreme Court of Appeals, and it is therefore properly preserved for review in this Court. Pet. for Appeal 49.

erty in violation of the fundamental guarantees embodied in the Due Process Clause.[2]

The absence of meaningful judicial review is evident from the fact that the trial court recognized the lack of evidentiary support for the breach-of-confidentiality damages, expressed its "concern[]" with that damages award, and then inexplicably left the damages award undisturbed. Pet. App. 12a. The lack of meaningful post-trial review was compounded by the refusal of the West Virginia Supreme Court of Appeals to hear DMS's appeal.[3] Thus, far from "be[ing] provided ample opportunity to seek relief through the judicial process" (Opp. 11), the state judicial system did not afford DMS any viable recourse against the jury's arbitrary and irrational award of breach-of-confidentiality damages.

Respondent contends that the trial court's reduction of the breach-of-contract damages awarded against DMS establishes that the trial court also undertook a meaningful review of the breach-of-

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[2] Respondent's contention that DMS's alleged "wrongful conduct"—*i.e.*, its liability for breach of contract and breach of the confidentiality agreement--is a basis for precluding it from "question[ing] how the jury arrived at" the $10.5 million verdict has absolutely no legal—or logical—support. Opp. 23. Respondent's argument would foreclose any defendant found liable at trial from challenging the size of the damages award against it—a proposition that is fundamentally at odds with this Court's due process jurisprudence. *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (adjudicating a defendant's challenge to the size of a punitive damages award).

[3] Respondent successfully evaded any substantive scrutiny of the $10.5 million verdict by quickly and unilaterally withdrawing its own appeal, for which discretionary review had been granted, in order to foreclose DMS from cross-assigning the breach-of-confidentiality award as error.

confidentiality award. Opp. 4. But regardless of whether the trial court's review of the breach-of-contract award was constitutionally meaningful, the fact remains that the trial court recognized the absence of evidentiary support for the breach-of-confidentiality award but nevertheless failed to do anything about it. Such abdication of the judicial function cannot constitute constitutionally adequate review. Similarly, the fact that DMS was able to submit a lengthy brief to the West Virginia Supreme Court (*id.* at 12) in an (ultimately unsuccessful) effort to persuade the court to accept its case for review cannot substitute for substantive appellate review of the *merits* of DMS's challenge to the legally and factually flawed damages award.

The absence of meaningful review—at either the trial or appellate level—of the breach-of-confidentiality award deviates from longstanding common-law procedures and thus cannot be reconciled with the Fourteenth Amendment's due process protections. *Cf. Oberg*, 512 U.S. at 432 n.10; *see also* Br. of Product Liability Advisory Council, Inc. at 12 ("By not affording petitioner the right to appellate review of the jury's verdict, and by not requiring any reviewing court to set forth its rationale for sustaining the verdict, West Virginia's procedures as implemented in this case deviate from the common law.").

Respondent's effort to distinguish *TXO*, *Oberg*, and *State Farm*—and to immunize its damages award from the constitutional protections recognized in those decisions—is ineffectual. Opp. 10. The fact that those decisions were rendered in the punitive damages context does not undermine their force in the compensatory damages setting because they are premised on fundamental common-law safeguards

that are applicable in *all* cases. Indeed, "there is no suggestion that different standards of judicial review were applied for punitive and compensatory damages before the 20th century." *Oberg*, 512 U.S. at 422 n.2. The Constitution protects all civil litigants against arbitrary state action, including irrational compensatory damages awards that lack any evidentiary foundation. This protection against arbitrary deprivations of property is the essential promise of due process. *See Ohio Bell Tel. Co.*, 301 U.S. at 302.

This Court's review is warranted to vindicate these fundamental due process principles and to reconcile the decision below with this Court's due process jurisprudence.

II. THE DECISION BELOW RAISES AN ISSUE OF EXCEPTIONAL IMPORTANCE TO STATE COURT LITIGANTS.

Nothing in respondent's opposition brief can diminish the importance of this case to state court litigants in West Virginia and in other States that provide for purely discretionary appellate review in civil actions. *See* Pet. for Writ of Cert. 16 n.1. As the three *amicus curiae* briefs filed in support of DMS underscore, this case affords the Court an important opportunity to ensure that state court litigants are not exposed to arbitrary and irrational verdicts that are insulated from all meaningful judicial review. "The procedures used by the West Virginia courts in this case . . . fell woefully short of what the Due Process Clause requires." Br. of Product Liability Advisory Council at 4. Not only was there "no review of the jury's decision by a court that did not preside over the trial—as was standard at common law"—but there was also a complete absence of a "reasoned explanation for [the trial court's] decision to let the

jury award stand." *Id.* Such deprivations of fundamental due process rights seem to occur with alarming frequency—especially for out-of-state litigants—in the West Virginia judicial system. *See* Br. of Washington Legal Foundation at 12-16.

The implications of this case therefore extend well beyond the parties to this dispute. If the decision below is left undisturbed, West Virginia and other States will be given virtually unbridled discretion to structure and operate their court systems in a manner that obliterates fundamental due process safeguards—such as the right to obtain meaningful judicial review of a verdict that lacks any evidentiary support. This case affords the Court the opportunity to clarify the scope of these due process protections and to reinforce these fundamental constitutional safeguards in the face of state court encroachments on litigants' constitutional rights. This Court has often stepped in to review state court procedures that raise serious constitutional concerns (*see, e.g.*, *Oberg*, 512 U.S. at 435), and there is a compelling need for it to do so again here.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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